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DATO' ABDUL RAHMAN
DATO' MOHAMMED HASHIM & ORS

v.

MASS MEDIA INTERACTIVE SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D-22NCC-694-2009]
6 JANUARY 2010

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CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application to restrain defendants from convening an Extraordinary General Meeting or implementing any resolution thereto to remove plaintiffs as directors of 3rd defendant pending disposal of suit - Whether there were serious issues to be tried - Balance of convenience - Status quo - Companies Act 1965, ss. 145, 158(4)*

D

COMPANY LAW: *Directors - Removal - Injunction - Application to restrain defendants from convening an Extraordinary General Meeting or implementing any resolution thereto to remove plaintiffs as directors of 3rd defendant pending disposal of suit - Whether there were serious issues to be tried - Balance of convenience - Status quo - Companies Act 1965, ss. 145, 158(4)*

E

COMPANY LAW: *Meetings - Injunction - Application to restrain defendants from convening an Extraordinary General Meeting or implementing any resolution thereto to remove plaintiffs as directors of 3rd defendant pending disposal of suit - Whether there were serious issues to be tried - Balance of convenience - Status quo - Companies Act 1965, ss. 145, 158(4)*

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This was an application by the plaintiffs seeking an interlocutory injunction restraining the defendants from convening an Extraordinary General Meeting ('EGM') or implementing any resolution thereto to remove the plaintiffs as directors of the 3rd defendant, pending the disposal of this suit. The plaintiffs averred that there were serious questions to be tried, namely: (i) whether the special notice for the EGM issued under s. 145 Companies Act 1965 ('CA') was valid; (ii) whether the 1st defendant's action in convening the EGM was in breach of an agreement entered into between the 1st plaintiff and the 1st defendant wherein it was agreed the full management and control of the 3rd defendant would be

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ceded to the 1st, 2nd and 3rd plaintiffs to act as directors; and (iii) whether the 1st defendant's action in convening the EGM constituted an abuse of process and should be restrained accordingly. A

Held (allowing the application with costs):

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(1) The plaintiffs' application for an interlocutory injunction must be allowed for, *inter alia*, the following reasons: (i) there was much merit in the plaintiffs' submission that there were serious issues to be tried and the balance of convenience required the *status quo* to be maintained; (ii) on the facts, it was clear that the 1st defendant had purchased the 2nd defendant's share. The purported EGM moved by the 1st and 2nd defendants could not be correct within the spirit and intent of s. 145 CA, which requires two members who hold the requisite issue and paid up capital in the company to request for an EGM. It would appear at the this stage that the EGM was in substance being moved only by one member; (iii) on the facts, the 1st defendant's argument that the 2nd defendant had given a power of attorney to the 1st defendant to call for the meeting did not strictly comply with s. 145 CA. It was doubtful whether such power of attorney could be given and the 1st defendant did not cite any authorities on this issue. The 1st defendant's argument that pursuant to s. 158(4) CA the register of members should be *prima facie* evidence of any matter inserted therein was flawed as there was conclusive evidence in this case that the 2nd defendant was no more a member and the register needed to be rectified. When there is conclusive evidence, there is no necessity to rely on *prima facie* evidence and s. 158(4) CA will not be applicable. In consequence the 1st defendant was the only member, and the power of attorney could not be validly given by a person who was not a member, and the 2nd defendant also confirmed that it was not a member save as reflected in the register; and (iv) the plaintiffs' argument that the notice to remove the plaintiffs as directors in breach of the agreement between the 1st plaintiff and the 1st defendant warranted further consideration and at this stage they should not be removed, more so when the court was ready to hear and dispose of the writ action within two months if the 1st defendant was ready to defend the action. (para 12)

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Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

American Cynamide v. Ethicon Ltd [1975] HL (E) 396 ***(refd)***

Aramin Sdn Bhd v. Juta Rasmi (M) Sdn Bhd [2005] 2 CLJ 620 HC ***(refd)***

Bentley-Stevens v. Jones [1974] 2 All ER 653 ***(refd)***

Burland v. Earle [1902] AC 83 ***(refd)***

Cheong Yuk Wai & Anor v. Low Sai Wee & Ors [1998] 1 LNS 549 ***(refd)***

Firstcrest Global Ltd & Ors v. Indexia Assets Ltd & Ors And Another Appeal [2006] 3 CLJ 860 CA ***(refd)***

Ford-Hunt v. Raghbir Singh [1973] 2 All ER 700 ***(refd)***

Hayes v. Bristol Plant Hire, Ltd & Ors [1957] Ch D 685 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor [1986] 1 CLJ 417; [1986] CLJ (Rep) 371 HC ***(refd)***

Humes Ltd v. Unity A.P.A. Ltd & Anor [1987] 5 ACLC 15 ***(refd)***

Indian Corridor Sdn Bhd & Anor v. Golden Plus Holdings Bhd [2008] 5 CLJ 774 CA ***(refd)***

LC O'Neil Enterprise Pty Ltd & Anor v. Toxic Treatments Ltd [1986] 4 ACLC 178 ***(refd)***

Legion Oils and Boyd v. Barron [1956] 2 DLR 505 ***(refd)***

Low Yin Kow v. Tor Len Hua & Ors [2002] 7 CLJ 234 HC ***(refd)***

Macdougall v. Gardiner [1874] 10 Ch App 606 ***(refd)***

Mobikom Sdn Bhd v. Inmiss Communication Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***

Paillart Philippe Marcel Etienne & Anor v. Eban Stuart Ashley & Anor [2007] 1 SLR 132 ***(refd)***

Paringa Mining and Exploration Co Plc v. North Flinders Mines Ltd & Ors [1988-1989] 14 ACLC 587 ***(refd)***

Re Canadian Javelin Ltd & Bood Strachan Coal [1977] 69 DLR 439 ***(refd)***

Re Opera Photographic Ltd [1989] BCLC 763 ***(refd)***

Roxy Electric Industries (M) Bhd v. Sykt Nominee Bumiputra Sdn Bhd & Ors [1989] 2 CLJ 657; [1989] 2 CLJ (Rep) 414 HC ***(refd)***

T & TT Enterprise Sdn Bhd v. Lembaga Pembangunan dan Lindungan Tanah [2007] 1 LNS 571 HC ***(refd)***

Tan Chong Keat Sdn Bhd v. Pintar Pintas Sdn Bhd [2005] 2 CLJ 863 CA ***(refd)***

Teo Choon Mong Frank v. Wilh Schulz Gmbh [1998] 2 SLR 529 ***(refd)***

Tien Ik Sdn Bhd & Ors v. Peter Kuok Khoon Hwong [1993] 1 CLJ 9 SC ***(refd)***

Tuan Haji Ishak Ismail v. Leong Hup Holdings Berhad & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Young Kee Chan & Ors v. Phileo Allied Finance (M) Bhd [2000] 4 CLJ 603 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 128(2), 145, 153, 158(4)

For the plaintiffs - Romesh Abraham (Kevin Prakash, B Mathevi with him); M/s Shook Lin & Bok
For the 1st defendant - Bryan Ernest Cumming (Tan Yew Aik with him); M/s Gideon, Tan Razali Zaini
For the 2nd defendant - PL Leong; M/s Sreenevasan Young

Reported by Suresh Nathan

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiffs' application encl. 3 seeking an interlocutory injunction, in essence, to not remove them as directors until the disposal of this suit. The prayer *inter alia* reads as follows:

> (1) An order that the 1st and 2nd Defendants, whether by themselves, their servants and agents, employees or any of them or otherwise, be restrained from convening, holding or allowing to be held, any Extraordinary General Meeting or any meeting scheduled on 7.1.2010 (or any other date) whatsoever or passing and/or implementing any resolution thereto that purports to or to have the effect of:
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> (i) removing the plaintiffs, as directors, of the 3rd defendant and/or in any manner, interfering with the position and rights of the parties, as directors; and
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> (ii) appointing any person or persons, as directors, of the 3rd defendant, in substitution of or in addition to the plaintiffs, as directors, of the 3rd defendant.
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> (2) That the defendants, whether by itself, its servants or agents, be restrained, pending further order, from taking any action in relation to and concerning the plaintiffs, which would pre-empt the proper disposal of this action by this Honourable Court.

[2] I have at the outset informed the defendants that I am prepared to hear the writ action within one or two months according to the convenience of the parties, provided the defendants agree to defer the schedule EGM until the disposal of the suit or further orders from the court. The 1st defendant refused.

A **Brief Facts (Plaintiffs Version)**

[3] Plaintiffs are the directors of the 3rd defendant. The 1st and 2nd defendants together with Dibena Enterprise Sdn Bhd are the registered shareholders of the 3rd defendant.

B **[4]** The 1st plaintiff is the majority shareholder and director of a company known as SPIN. SPIN is the beneficial owner of the 30% block of shares in the 3rd defendant (currently registered in the name of the 2nd defendant) pursuant to a Sale and Purchase Agreement with I-Twohearts.com Sdn Bhd. This purchase of the C 30% block of shares is presently pending approval from Unit Pemodenan Tadbiran dan Perancangan Pengurusan Malaysia (MAMPU) and is the same 30% block of shares which is registered in the name of the 2nd defendant.

D **[5]** On or about August 2007, the 1st plaintiff was invited by the then Chief Executive Officer (CEO) of the 1st defendant, to assist in resolving the various problems that the 3rd defendant encountered with the relevant authorities which included inter alia issues pertaining to corruption. They offered, on behalf of the 3rd E defendant, that the 1st plaintiff be appointed as a director of the 3rd defendant to improve its business operations.

[6] It was also further specifically agreed between the 1st defendant and the 1st plaintiff, that SPIN would eventually take F over the 3rd defendant and, further, that SPIN would be treated as a strategic partner and new investor in the 3rd defendant whereby full management and control of the 3rd defendant would be ceded to the 1st, 2nd and 3rd plaintiffs to act as directors. This agreement was crystallized in a Memorandum dated 29 October 2007 to the G Board of Directors of PCB.

[7] In breach of the agreement, the 1st and 2nd defendants purported to issue a Special Notice under ss. 128(2), 145 and 153 of the Companies Act 1965 for an Extraordinary General Meeting H on 7 January 2010 of the 3rd defendant seeking removal of the current directors and company secretaries of the 3rd defendant.

[8] The plaintiffs by this instant application seek interim orders, *inter alia*, that the defendants be restrained from holding and/or passing and/or implementing any resolution at the purported I Extraordinary General Meeting of the 3rd defendant, scheduled on 7 January 2010, pending the proper disposal of this action.

Serious Questions To Be Tried

[9] The plaintiffs say there are serious questions to be tried namely:

(i) whether the purported special notice dated 1 December 2009 (the said notice) purportedly issued under s. 145 of the Companies Act 1965 (CA) is valid.

(ii) whether the 1st defendant's action in convening the Extraordinary General Meeting (EGM) is in breach of the Agreement entered between the 1st plaintiff and the 1st defendant wherein it was agreed that full management and control of the 3rd defendant would be ceded to the 1st, 2nd and 3rd plaintiffs to act as directors.

(iii) whether the actions of the 1st defendant, in convening the EGM, constitute an abuse of process and should be restrained accordingly.

[10] The 1st defendant *inter alia* says:

(i) there is no shareholders' agreement between the plaintiff and the 1st defendant;

(ii) the defendants have no representatives on the Board of Directors of the 3rd defendant since April 2008, despite having the right to appoint their representatives pursuant to shareholders agreement between 1st, 2nd defendant and DIBENA;

(iii) Article 69 of the 3rd defendant's Memorandum of Association confers the right to remove a director;

(iv) on 1 December 2009, the 1st and 2nd defendants issued a special notice to convene an EGM on the 3rd defendant to reconstitute the Board of the 3rd defendant company;

(v) no Annual General Meeting ("AGM") was convened for the year ending 2007 and 2008 for 3rd defendant. Shareholders were compelled to seek court's order to convene the AGM. Consent order to convene an AGM was recorded on 15 December 2009.

[11] The 2nd defendant had informed the court that they are not opposing or supporting the application. The plaintiffs and the 1st defendant relied on the following cases: *Tien Ik Sdn Bhd & Ors v. Peter Kuok Khoon Hwong* [1993] 1 CLJ 9; *Alor Janggus Soon Seng*

Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461; *Low Yin Kow v. Tor Len Hua & Ors* [2002] 7 CLJ 234; *Young Kee Chan & Ors v. Phileo Allied Finance (M) Bhd* [2000] 4 CLJ 603; *T & TT Enterprise Sdn Bhd v. Lembaga Pembangunan dan Lindungan Tanah* [2007] 1 LNS 571; *Cheong Yuk Wai & Anor v. Low Sai Wee & Ors* [1998] 1 LNS 549; *Firstcrest Global Ltd & Ors v. Indexia Assets Ltd & Ors And Another Appeal* [2006] 3 CLJ 860; *Paillart Philippe Marcel Etienne & Anor v. Eban Stuart Ashley & Anor* [2007] 1 SLR 132; *Tan Chong Keat Sdn Bhd v. Pintar Pintas Sdn Bhd* [2005] 2 CLJ 863; *Mobikom Sdn Bhd v. Inmiss Communication Sdn Bhd* [2007] 3 CLJ 295; *Teo Choon Mong Frank v. Wilh Schulz Gmbh* [1998] 2 SLR 529; *Macdougall v. Gardiner* [1874] 10 Ch App 606; *Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor* [1986] 1 CLJ 417; [1986] CLJ (Rep) 371; *American Cynamide v. Ethicon Ltd* [1975] HL (E) 396; *Aramin Sdn Bhd v. Juta Rasmi (M) Sdn Bhd* [2005] 2 CLJ 620; *Hayes v. Bristol Plant Hire, Ltd & Ors* [1957] Ch. D 685; *L.C. O'Neil Enterprise Pty. Ltd. & Anor v. Toxic Treatments Ltd.* [1986] 4 ACLC 178; *Humes Ltd. v. Unity A.P.A. Ltd. & Anor* [1987] 5 ACLC 15; *Paringa Mining and Exploration Co. Plc v. North Flinders Mines Ltd & Ors* [1988-1989] 14 ACLC 587; *Legion Oils and Boyd v. Barron* [1956] 2 DLR 505; *Burland v. Earle* [1902] AC 83; *Roxy Electric Industries (M) Bhd v. Sykt Nominee Bumiputra Sdn Bhd & Ors* [1989] 2 CLJ 657; [1989] 2 CLJ (Rep) 414, *Indian Corridor Sdn Bhd & Anor v. Golden Plus Holdings Bhd* [2008] 5 CLJ 774, *Ford-Hunt v. Raghbir Singh* [1973] 2 All ER 700; *Re Canadian Javelin Ltd. & Bood Strachan Coal* [1977] 69 DLR 439; Bentley-Stevens v. Jones [1974] 2 All ER 653; *Re Opera Photographic Ltd.* [1989] BCLC 763; *Tuan Haji Ishak Ismail v. Leong Hup Holdings Berhad & Other Appeals* [1996] 1 CLJ 393.

[12] I have read the application, affidavits, submission of the parties in detail. After careful consideration of the submission of the 1st defendant I take the view the plaintiffs' application for interlocutory injunction prayer (1) must be allowed. My reasons *inter alia* are as follows:

(i) There is much merit in the plaintiffs' submission that there are serious issues to be tried and the balance of convenience requires the *status quo* to be maintained. I do not wish to set out the details of the arguments of the plaintiff and the 1st defendant as it has been adequately dealt with by the learned counsels in the submission for which I am grateful.

(ii) On the facts of the case it is clear that the 1st defendant has purchased the 2nd defendant's share. The purported EGM moved by the 1st and 2nd defendants cannot be correct within the spirit and intent of s. 145 of CA 1965. That section requires two members who hold the requisite issue and paid up capital in the company to request for an EGM. It will appear at this stage that EGM in substance being moved only by 1 member.

(iii) The 1st defendant's argument that the 2nd defendant has given a power of attorney to the 1st defendant to call for the meeting does not strictly comply with s. 145 of CA 1965 and it is doubtful whether such power of attorney can be given and the 1st defendant did not cite any authorities on this issue. The 1st defendant's argument that pursuant to s. 158(4) of CA 1965 the register of members shall be *prima facie* evidence of any matter inserted therein is flawed as there is conclusive evidence in this case that the 2nd defendant is no more a member and the register needs to be rectified. When there is conclusive evidence, there is no necessity to rely on *prima facie* evidence and s. 158(4) will not be applicable. In consequence the 1st defendant is the only member, and the power of attorney cannot be validly given by a person who is not a member, and the 2nd defendant also confirms that it is not a member save as reflected in the register.

(iv) The plaintiffs' argument that the notice to remove the plaintiffs as directors in breach of agreement between the 1st plaintiff and 1st defendant warrants further consideration and at this stage they should not be removed; more so when the court is ready to hear and dispose of the writ action within two months if the 1st defendant is ready to defend the action.

[13] For reasons stated above I allow plaintiffs' prayer (1) with costs with usual terms until the disposal of the suit. The 1st defendant to pay the plaintiffs a fixed costs of RM10,000.

I hereby order so.